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Labor Law - Power of State Court to Award Damages for Peaceful Picketing

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Notes

LABOR LAW — POWER OF STATE COURT TO AWARD DAMAGES FOR PEACEFUL PICKETING

Plaintiffs, operators of two retail lumber yards, were asked by defendant unions to sign a contract containing a union shop provision. Plaintiffs refused to sign the contract because none of their employees wished to join the unions. As a result, the unions began peacefully picketing the plaintiffs' premises. Plaintiffs filed suit in state court for an injunction and damages and at the same time filed a representation petition with the National Labor Relations Board. The NLRB dismissed the petition because the amount of interstate commerce involved did not meet the minimum monetary standards. The state court issued an injunction and awarded plaintiffs damages, holding that the purpose of the picketing was to compel acceptance of the rejected contract. On appeal, the unions contested this finding, claiming that the only purpose of their activities was to educate the workers and persuade them to become union members. The State Supreme Court affirmed,[1] holding that picketing to compel acceptance of the contract constituted an unfair labor practice under Section 8(b) (2) of the Labor Management Relations Act and hence was not protected under state law. On the same day the United States Supreme Court rendered its decision on certiorari in the instant case,[2] it also rendered its decision in *Guss v. Utah Labor Relations Board*[3] and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc.*,[4] which held that where union activity affects interstate commerce, thereby falling within federal statutory regulation, the state's power to grant relief of an equitable nature is preempted. Because the Court found that those cases controlled this one in its major aspects, it vacated the judgment below and remanded the case. Because the state court did not specify whether the damage award was based upon state or federal law the United States Supreme Court did not reach the question relative to the propriety of the state court's action in this respect. The case was

1. Garmon v. San Diego Building Trades Council, 45 Cal.2d 657, 291 P.2d 1 (1955).
2. San Diego Building Trades Council v. Garmon, 353 U.S. 26 (1957).
3. 353 U.S. 1 (1957).
4. 353 U.S. 20 (1957).

remanded to determine whether the award of damages should be sustained under state law. The state court then set aside the injunction but sustained the award of damages,[5] relying on tort provisions of the California Civil Code and state enactments dealing with labor relations. On second certiorari the United States Supreme Court *held,* reversed. Because the NLRB has not ruled upon the status of the union conduct, and because the activity might be within Section 7 or Section 8 of the Labor Management Relations Act, the state's jurisdiction to award damages is preempted. Four Justices concurred in the result upon the ground that the union's activity might be considered protected under the Labor Management Relations Act. However, the concurring Justices felt that the state court's power to award damages should be sustained if the union's conduct were deemed federally prohibited. *San Diego Building Trades Council v. Garmon,* 3 L. Ed. 2d 775 (U.S. 1959).

As there is a need for uniformity in the regulation of labor relations affecting interstate commerce, a determination by Congress that certain activity is deemed to be protected and other activity to be prohibited must be respected by state courts. Such a determination was made by Congress in the passage of the LMRA. Under this act, the NLRB was given primary jurisdiction over labor disputes affecting interstate commerce,[6] and has authority to determine in each case whether the conduct involved violates federal law or is protected under the Labor Management Relations Act. If there is a possibility that the conduct is either protected or prohibited, state courts cannot assert jurisdiction,[7] due to the conflict with federal policy objectives which may result. Therefore, states can neither interfere with employees' freedom to choose their own collective bargaining representatives[8] nor fetter the employees' rights to participate in other concerted activities for the purpose of collective bargaining.[9] Further, the states may not enjoin, under their

5. Garmon v. San Diego Building Trades Council, 49 Cal.2d 595, 320 P.2d 473 (1958).

6. L.M.R.A. § 10(a), 29 U.S.C. §160(a) (1947) provides that: "This power [of the NLRB to prevent unfair labor practies] shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise" provided that the Board may, by agreement, cede jurisdiction to a state agency, unless the applicable provision of the state statute is inconsistent with the LMRA.

7. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1954); Garner v. Teamsters, 346 U.S. 485 (1953).

8. Hill v. Florida, 325 U.S. 538 (1945).

9. Amalgamated Association v. WERB, 340 U.S. 383 (1951); International Union of UAA & A. v. O'Brien, 339 U.S. 454 (1950).

own laws, conduct which has been made an unfair labor practice under the federal act.[10] Even where the NLRB fails to assert its jurisdiction, for budgetary or other reasons,[11] the United States Supreme Court has held that Congress has completely preempted state power to grant equitable relief.[12] However, where Congress has expressed no opinion as to the status of certain conduct, it is the Court which must decide in each case whether the conduct may be fairly considered protected or prohibited. If the Court decides that Congress has not impliedly dealt with the activity, state courts may be allowed to act. Such tactics as unannounced work stoppages and slowdowns employed by a union seeking unstated objectives may fall within neither protected nor prohibited categories. Thus, state courts may act or the conduct will be entirely ungoverned.[13] Another area in which state courts have been allowed to grant relief is where violence and mass picketing have been employed in labor disputes. Because Congress has not clearly manifested an intention to exclude states from asserting their traditional police powers in labor disputes, the United States Supreme Court has consistently upheld state court injunctions directed at such conduct.[14] Although the national act provides injunctive relief[15] and

10. Garner v. Teamsters, 346 U.S. 485 (1953).

11. The NLRB may decline jurisdiction when it feels that the policy of the act will not be effectuated by entertaining jurisdiction in a particular case, or when small businesses having only local significance are involved. The NLRB declines jurisdiction where the amount of the employer's business falls below the dollar volume standards published by the Board periodically. See 42 L.R.R.M. 96 (1958).

12. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

13. This area of the law is not wholly clear. In International Union UAW v. WERB, 336 U.S. 245, 265 (1949), the Supreme Court, dealing with unannounced work stoppages and slow-downs employed by the union, said that this conduct "to win unstated ends was neither forbidden by federal statute nor was it legalized and approved thereby." Consequently, there was "no basis for denying to Wisconsin the power, in governing her internal affairs, to regulate a course of conduct neither made a right under federal law nor a violation of it and which has the coercive effect obvious in this device." However, in Garner v. Teamsters Union, 346 U.S. 485 (1953), the Court stated that where Congress has not forbidden certain conduct there may be an intent to remove such activity from all government regulation. In the instant case, the majority suggests that where activity is neither protected nor prohibited, *the question is then raised as to whether such activity may be regulated by the states.* The concurring Justices, however, felt that the question was closed by *International Union, UAW v. WERB*, there being "no pre-emption when the conduct charged is in fact neither protected nor prohibited." San Diego Building Trades Council v. Garmon, 3 L. Ed.2d 775, 788, 79 Sup. Ct. 773, 784 (1959).

14. International Union, UAAAIW v. Russell, 356 U.S. 634 (1958); Youngdahl v. Rainfair, Inc., 355 U.S. 131 (1957); United Automobile, A. & AIW v. WERB, 351 U.S. 266 (1956); Allen-Bradley Local No. 1111, UERMW v. WERB, 315 U.S. 740 (1942).

15. L.M.R.A. §§ 10(j), (l), 29 U.S.C. § 160(j), (l) (1947).

damages[16] to compensate for such conduct, it appears that the states' concern for domestic tranquility overrides any need for federal administrative action. The United States Supreme Court has also recognized the states' power, in certain instances, to redress injuries by awarding damages. In *United Construction Workers v. Laburnum*[17] an employer brought an action against the union for damages based on violent conduct. The state court found the defendant's conduct was a common law tort. The United States Supreme Court, although assuming that an unfair labor practice was involved, nevertheless allowed state court jurisdiction because there was no compensatory relief under the federal act in conflict with the state's remedy. However, the Court did not discuss whether the same result would follow if only peaceful activity was involved. In *International Union, U.A.A. and A.I.W. v. Russell*[18] the Court was again faced with the problem of state damages awards arising from labor relations. In that case, a non-union employee was prevented from working due to violent picketing. The Supreme Court found that the picketing was not protected by the federal act and the state court's jurisdiction was sustained because Congress, although allowing partial relief through back pay, had not preempted the state's common law power to give damages. The Court apparently felt that there was no conflict between the state and federal remedies although an employee might recover damages in a tort action in a state court, but possibly be denied the administrative remedy of back pay by the NLRB. The Court distinguished prior preemption cases as having excluded state action through fear that one tribunal would *enjoin* conduct which others might find legal. The United States Supreme Court has also allowed a state court to award damages in an action for breach of contract by an employee against his union.[19]

Thus at this point it appears that state tribunals must yield jurisdiction to the NLRB where the conduct in question may be fairly considered either as protected or prohibited by the federal act.[20] The fact that the NLRB fails to assert its jurisdiction does not give the states power to act.[21] However, where violence

16. L.M.R.A. § 303(a), (b), 29 U.S.C. § 187(a), (b) (1947).
17. 347 U.S. 656 (1954).
18. 356 U.S. 634 (1958).
19. International Association of Machinists v. Gonzales, 356 U.S. 617 (1958).
20. Weber v. Anheuser-Busch, Inc., 348 U.S. 468 (1954); Garner v. Teamsters, 346 U.S. 485 (1953).
21. Guss v. Utah Labor Relations Board, 353 U.S. 1 (1957).

is involved, state courts may provide injunctive relief.[22] State courts may also award damages for the consequences of tortious conduct,[23] as well as for those activities which are on the fringe of federal regulation,[24] such as the breach of contract case.

Because the peaceful conduct involved in the instant case arguably falls within one of the protected or prohibited categories of the Labor Management Relations Act, the Supreme Court was faced with a damage suit arising from a situation covered by federal legislation. Neither *Laburnum* nor *Russell* specifically decided whether a state court could grant damages when only peaceful conduct was involved. In the instant case this Court concludes that these decisions are to be restricted to situations involving violence. It must be remembered that the Supreme Court has consistently denied the states' power to grant injunctive relief in the absence of violence. The Court now points out that regulation of labor relations by the states can be effectively exerted through an award of damages as through injunctive relief. Consequently, to avoid the double standards of regulation which may result, the states are deprived of power to award damages in the absence of violence. Hence, it appears that the effect of the instant case is to place compensatory damages and injunctive relief on a parity, the states being deprived of jurisdiction regardless of the remedy sought, unless, of course, violence is involved.

Where Congress has not specifically categorized certain conduct as prohibited or protected, the Court will be faced with a policy decision and necessarily will have to determine whether state action will conflict with the federal statute. Where the Court concludes that conduct is protected, a greater chance of conflict arises between state and federal action than where the conduct in question is prohibited and violates both state and federal law. Consequently, the concurring Justices adhere to the distinction between protected and prohibited conduct, allowing state courts to levy damages against the latter. The concurring opinion is strengthened by the fact that (prior to the instant case) *Laburnum* could be interpreted to mean that a state may remedy the consequences of tortious conduct which is unpro-

22. See note 13 *supra*.

23. International Union, UAA & AIW v. Russell, 356 U.S. 634 (1958); United Construction Workers v. Laburnum, 347 U.S. 656 (1954).

24. International Association of Machinists v. Gonzales, 356 U.S. 617 (1958); Algoma Plywood and Veneer Co. v. WERB, 336 U.S. 301 (1949).

tected by the federal act, whether the conduct be violent or peaceful. The majority, however, seemed to feel that conflict will result unless the expert administrative agency, rather than a state court, decides the issues in a labor controversy. The majority may be adhering to the proposition that states should not be allowed to establish their own labor policy as such.[25] Assault, battery, and mass picketing can certainly be distinguished from a labor controversy. However, when only peaceful activity is involved, being so completely enmeshed in a labor controversy covered by the federal act, regulation by the states will necessarily affect national policy objectives. The result of the majority decision and prior jurisprudence is to deprive the plaintiff of all remedies administered by both the federal and state governments. This appears to be an undesirable result. The concurring Justices apparently felt that the regulatory effect, if any, of allowing a state court to award damages must be subordinated to the need for a remedy to prevent a small businessman from being forced out of business, or a union from being extinguished, as a result of conduct found by a state court to be tortious.

The 1959 amendments to the Labor Management Relations Act[26] are designed to solve some of the preemption problems in the labor field. The new act provides that the NLRB may decline to assert jurisdiction over any labor dispute where the effect on interstate commerce is not sufficient to warrant the exercise of jurisdiction. But, the Board cannot decline to assert jurisdiction over any dispute which it would have handled under the monetary standards in effect as of August 1, 1959. It appears that the Board may lower its monetary standards and assert jurisdiction over a greater number of cases; but it cannot raise its standards in such a way as to take fewer cases. Where the volume of business transacted by the employer is below the board's jurisdictional standards, the new amendments allow the *states* to assert jurisdiction. There should be no need for the Board specifically to decline to assert its jurisdiction. It appears that once the NLRB has issued its dollar volume standards, the state courts may immediately assert jurisdiction over those cases involving industries whose volume of business falls below those standards. However, problems will arise in cases which

25. *Cox, Federalism in the Law of Labor Relations*, 67 HARV. L. REV. 1297 (1954).

26. Labor-Management Reporting and Disclosure Act § 701 (1959).

meet the Board's monetary standards; but the plaintiff fails to present his case to the NLRB, the Board's General Counsel refuses to issue a complaint, or the Board finds no violation of the Labor Management Relations Act. In such cases it would appear that existing preemption principles will remain valid; and consequently, state court or state agency action will be precluded.

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PRACTICE AND PROCEDURE — INTERVENTION BY INSURED IN ACTIONS BROUGHT UNDER THE DIRECT ACTION STATUTE

Following a two-car collision, plaintiff, driver of one car, brought a direct action for damages against the other driver's insurer. The insured intervened, claiming damages against the plaintiff on the ground that the plaintiff's negligence was the cause of the collision. Plaintiff's objection to the intervention was overruled by the trial court. On appeal, the Orleans Court of Appeal held that the intervention should have been dismissed.[1] On certiorari to the Louisiana Supreme Court, *held*, reversed. In a suit against an insurer under the Direct Action Statute,[2] the insured is an interested party and can intervene to assist in proving plaintiff's fault and to recover damages from the plaintiff for injuries sustained in the collision. *Emmco Insurance Company v. Globe Indemnity Company*, 236 La. 286, 111 So.2d 115 (1959).

Article 390 of the Louisiana Code of Practice provides that a prospective intervener must have "an interest in the success of either of the parties to the suit, or an interest opposed to both."[3] The term "interest" has not been clearly defined by the jurisprudence.[4] It has been suggested, however, that it must be

1. Emmco Ins. Co. v. Globe Indemnity Co., 105 So.2d 748, 752 (La. App. 1958): "The so-called intervention in the instant suit being an independent claim asserted by intervenor against one of the plaintiffs, it seems to us it does not meet the test of law that the intervention must be one that must fall in the event of the dismissal of plaintiff's suit. This intervention, if such were authorized by law, could only have been dismissed in the event the plaintiffs were successful in their suit against the defendant!"

2. LA. R.S. 22:655 (1950).

3. LA. CODE OF PRACTICE art. 390 (1870), now LA. R.S. 13:390 (1950).

4. See Blodgett Construction Co. v. Board of Commissioners, Caddo Levee District, 153 La. 623, 96 So. 281 (1922) (contractor was allowed to intervene in suit by subcontractor against levee board to recover balance due on work done); Fortner's Heirs v. Pine Good Lumber Co., 146 La. 11, 83 So. 319 (1919) (person